



Department of Environment and Conservation
State of Tennessee

*1 IN THE MATTER OF: TELLICO LANDING, LLC AND SHARP CONTRACTING, INC. AND
RARIY COMMUNITIES, INC., RESPONDENTS
DIVISION OF WATER POLLUTION CONTROL
Case No. 06-0368
April 13, 2007

COMMISSIONER'S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Department" or "TDEC").

II.

Rarity Communities, Inc. (hereinafter the "Respondent Rarity Communities") is developing five or more planned residential developments in eastern Tennessee, including a subdivision named Rarity Pointe in Loudon County near Latitude 35 degrees 45 minutes and longitude 84 degrees 15 minutes (hereinafter the "Site"), and is listed as an active for-profit corporation licensed to conduct business in the State of Tennessee. Service of process may be made on Respondent Rarity Communities, Inc. registered agent Michael L. Ross, 2624 Carpenters Grade Road, Maryville, Tennessee 37801.

III.

Tellico Landing, LLC (hereinafter the "Respondent Tellico") is specifically developing the subdivision named Rarity Pointe and is listed as an active limited liability company licensed to conduct business in the State of Tennessee. Service of process may be made on Respondent Tellico Landing registered agent Michael L. Ross, 100 Rarity Bay Parkway, Vonore, Tennessee 37885.

IV.

Sharp Contracting, Inc. (hereinafter the Respondent "Sharp") is the contractor listed on the Notice of Coverage (NOC) and is listed as an active corporation licensed to conduct business in the State of Tennessee. Service of process may be made on Respondent Sharp Contracting, Inc. registered agent Carolyn Jo Leto Sharp at 235 South Old Glory Road, Maryville, Tennessee 37801.

JURISDICTION

V.

Whenever the Commissioner has reason to believe that a violation of [Tennessee Code Annotated \(T.C.A.\) § 69-3-101](#) et seq., the Water Quality Control Act, (hereinafter the "Act") has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and may order that corrective action be taken, pursuant to [T.C.A. § 69-3-109\(a\)](#) of the Act. Further, the Commissioner has

authority to assess civil penalties against any violator of the Act, pursuant to [T.C.A. § 69-3-115](#) of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to [T.C.A. § 69-3-116](#) of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated, pursuant to [T.C.A. § 69-3-105](#), and are effective as the Official Compilation Rules and Regulations of the State of Tennessee, Chapters 1200-4-3 and 1200-4-4 (hereinafter the "Rule").

VI.

*2 The Respondents Rarity Communities, Inc., Tellico Landing, LLC and Sharp Contracting, Inc. are each "persons" as defined at [T.C.A. § 69-3-103\(20\)](#) and as herein described, have violated the Act.

VII.

Tellico Lake and its unnamed tributaries, referred to herein, are "waters of the state", as defined by [T.C.A. § 69-3-103\(33\)](#). Pursuant to [T.C.A. 69-3- 105\(a\)\(1\)](#), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, "Use Classifications for Surface Waters", is contained in the Official Compilation of Rules and Regulations for the State of Tennessee. Accordingly, Tellico Lake has been classified for the following uses: domestic water supply, industrial water supply, navigation, fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. The unnamed tributaries have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

VIII.

[Tennessee Code Annotated § 69-3-108](#) requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI). Pursuant to T.C.A. § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FACTS

IX.

The Rarity Pointe subdivision comprises approximately 716 acres of rolling hills on Tellico Lake, an impoundment of the Tellico and Little Tennessee Rivers. It is a planned luxury home and condominium community built around golf courses and a marina. The development is one of five planned Rarity Communities being built in eastern Tennessee by Respondent Rarity Communities.

X.

On April 10, 2002, Respondent Tellico applied for coverage under a TNCGP for phase one of the development as previously described in paragraph II (the "site"), which consisted of 90 acres.

XI.

On April 30, 2002, personnel from the Division of Water Pollution Control (the

"Division") inspected the site and observed that construction on 25 acres had already begun prior to receiving coverage under the TNCGP. Roads had been cut and EPSC measures were inadequate.

XII.

A Compliance Review Meeting (CRM) was held on May 2, 2002, at the Knoxville Environmental Field Office (K-EFO). Permit requirements and appropriate EPSC measures and soil stabilization methods were discussed with Respondent Tellico and Respondent Sharp.

XIII.

*3 A Notice of Violation (NOV) was issued to Respondent Tellico on May 2, 2002, and requested immediate implementation and maintenance of EPSC measures, submittal of a Storm Water Pollution Prevention Plan (SWPPP), and that all contractors on-site sign the NOI.

XIV.

The Division issued construction storm water coverage for 90 acres on this site under the TNCGP effective May 16, 2002, with an expiration date of May 31, 2005.

XV.

Division personnel inspected the site on June 26, 2002, and observed that no sign depicting a Notice of Coverage (NOC) was posted at the construction entrance and no SWPPP was available.

XVI.

On February 2, 2004, Respondent Tellico submitted a NOI for coverage under the TNCGP for an additional 175 acres (latitude 35 degrees 44 minutes 30 seconds and longitude 84 degrees 13 minutes 30 seconds and near Antioch Church Road/Highway US 231) adjacent to the original site to be developed into a golf course.

XVII.

On February 10, 2004, Division personnel inspected the site and observed that approximately 140 acres had been cleared prior to receiving coverage under the TNCGP. The Respondent stated that clearing at the golf course site had been ongoing since early December 2003. No EPSC measures were in place and sediment was observed deposited in inlets of Tellico Lake below the site.

XVIII.

The Division issued construction storm water coverage for an additional 175 acres on the golf course site under the TNCGP effective February 10, 2004 with an expiration date of May 31, 2005.

XIX.

The Division issued a second NOV and CRM request on February 17, 2004, for conducting activities without a valid permit and without EPSC measures in place. The NOV requested that construction be phased for projects in which over 50 acres of soil would be disturbed and that areas of the completed phase must be stabilized within 21 days after another phase has been initiated. The NOV requested immediate implementation and maintenance of EPSC measures and a submittal of a written response within 15 days of receipt of the NOV. A CRM was scheduled for March 9, 2004, at the Knoxville EFO.

XX.

On March 2, 2004 Respondent Tellico submitted a written response to the February 17, 2004, NOV on March 2, 2004. The letter stated that EPSCs were implemented immediately on February 10, 2004, and that inspections were being conducted in compliance with the TNCGP.

XXI.

A CRM was held on March 9, 2004, at the K-EFO to discuss the violations noted during the February 10, 2004, inspection with Respondents Tellico and Rarity communities. Division personnel discussed the need to apply for Aquatic Resource Alteration Permits (ARAPs) before any alterations may be made to waters of the state. The 50-acre phasing requirement of the TNCGP was discussed, as well as the importance of implementation and maintenance of EPSCs.

XXII.

On March 19, 2004, Respondent Tellico submitted a response to the CRM. The letter included a plan to ensure that no more than 50 acres are exposed during a construction phase. Respondent Tellico stated that as acreage in each phase was stabilized, an equal amount of acreage in the next phase would begin.

XXIII.

***4** On October 6, 2004, Division personnel conducted a site inspection. Division personnel asked Respondent Rarity Communities to show them the areas of the site where construction potentially affected waters of the state. During the inspection, TVA inspector Gary Pettway informed Division personnel it appeared that no streams remained due to siltation and/or culvertization.

Division personnel observed that construction encroached upon Tennessee Valley Authority (TVA) property and buffer zones. Silt fence was observed to be full of sediment and pushed down in areas and on the 17th fairway of the golf course site a 5-foot culvert underneath the road was blown out in Phase II (the golf course site). Numerous erosion rills and gullies were observed on-site. Check dams were ineffective. Sediment was observed deposited in Tellico Lake. A cove near the 18th fairway had been partially filled in by sediment.

XXIV.

On February 25, 2005, Division personnel conducted an inspection at the original site and the golf course site. It was observed that large areas of exposed soil had been left unstable for over 6 months. The new road across from the golf maintenance building had a large erosion gully that carried sediment to a sediment trap in front of a wetland area on TVA property. Sediment was observed leaving the trap and entering Tellico Lake. A silt fence was observed overrun with sediment at the edge of the lake and construction debris was falling downhill and onto the shoreline, including tubes of caulk and sealant. A sediment trap near lots 175 and 218 of the original site was overflowing and had begun to fill in the back of the cove. Sediment from the two sites was observed entering the lake in at least 9 separate locations.

XXV.

On March 7, 2005, the Division issued a third NOV to Respondents Tellico and Rarity Communities describing the violations observed on both the October 6, 2004, and February 25, 2005, inspections. The NOV requested implementation and maintenance of EPSC measures.

XXVI.

The Division conducted a follow up inspection at the site on April 5, 2005, with Respondent Tellico and Respondent Sharp. EPSC implementation and maintenance had improved at the site but areas in need of further improvement were pointed out to the Respondents.

XXVII.

On August 4, 2005, Division personnel conducted a site visit and observed numerous areas with inadequate EPSC measures. Division personnel observed erosion undercutting silt fences placed beneath a source of concentrated flow. Silt fences placed below a large check dam were filled with and overrun with sediment. Division personnel noted a backhoe clearing and scraping right up to the waters edge, past a basin with geofibre and over the silt fence. Wooded area outside of the silt fence and other EPSCs was filled with sediment. Respondent Sharp would not sign the inspection form nor accept responsibility for the site.

XXVIII.

Another CRM was held with Respondent Tellico and Respondent Rarity Communities on August 12, 2005. The Division reviewed photographs of the water quality violations observed at the site and explained the enforcement process. Respondent Tellico and Respondent Rarity Communities produced a plan for temporary and permanent seeding of the golf course and claimed that Respondent Sharp was responsible for the problems observed during the August 4, 2005, inspection.

XXIX.

*5 On November 3, 2005, Division personnel conducted a site inspection and observed that large areas of exposed soil had no EPSC measures and the road along the lakeshore had continued to erode badly and no vegetation stabilized the bank. Outfalls along the cove east and north of an old cemetery on-site were still causing sediment deposition into the Tellico Lake. One spot had a peninsula of sediment approximately 15 to 20-feet wide and over a foot deep in the affected cove of Tellico Lake.

XXX.

On November 7, 2005, Division personnel met with Respondent Rarity Communities along with representatives from the U.S. Army Corps of Engineers (USACOE) and TVA to specify areas in need of corrective action. USACOE and TVA requested that the Respondents apply for permits to excavate and remove sediment that has entered TVA property and entered wetlands and Tellico Lake when the lake is at drawdown elevation during the winter.

XXXI.

On November 16, 2005, a fourth NOV was issued to Respondent Rarity Communities reiterating the need for permit applications to be submitted to the USACOE and TVA to excavate and remove sediment that has entered TVA property and entered wetlands or Tellico Lake.

XXXII.

On February 9, 2006, Division personnel inspected the site and observed a steep slope at the end of the development that had collapsed. The outfalls which were pointed out to Respondent Rarity Communities at the last inspection continued to be problematic. Sediment from new road construction had filled check dams and overflowed into coves of Tellico Lake. The sediment in the coves and in the wooded

areas and wetlands had not been removed and silt fence rows were overtopped with sediment in multiple locations on-site. Two of the large outfalls near Tellico Lake had muddy water flowing out of them.

XXXIII.

Division personnel conducted an inspection at the site on May 18, 2006, and observed multiple areas with silt fence and sediment traps overrun with sediment; these were some of the same areas that had been pointed out in the past as needing attention. An area of several hundred square yards near the development's water intake pump house was filled with fresh sediment one to three feet deep. The sediment that had washed into coves and was to be removed from the lake remained untouched.

XXXIV.

Division personnel conducted an inspection of both sites on October 17, 2006 and observed that there were still problems with permit violations, including sediment entering a cove of Tellico Lake below lots 220/221 of the original site, eroding hillsides and filled or failing sediment traps at several locations. A digital photographic record of these violations was forwarded to the Respondent Tellico Landings, LLC together with a Notice of Violation on October 18, 2006.

XXXV.

In the course of investigating this matter the Division incurred damages in the amount of TWO THOUSAND TWENTY THREE DOLLARS AND FIFTEEN CENTS (\$2,023.15).

VIOLATIONS

XXXVI.

*6 In failing to install and maintain adequate sediment and erosion control measures to control storm water runoff as required by the TNCGP, as described herein, the Respondents have violated [T.C.A. § 69-3-108\(b\)](#) and [§ 69-3- 114\(b\)](#).

[T.C.A. § 69-3-108\(b\)](#) states:

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

(6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

[T.C.A. § 69-3-114\(b\)](#) states:

(b) In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in [§ 69-3-108](#); or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XXXVII.

By conducting activities without a permit as described herein, the Respondents have violated [T.C.A. § 69-3-108\(a\)](#).

[T.C.A. § 69-3-108\(a\)](#) states:

(a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

XXXVIII.

By causing a condition of pollution to waters of the state, as described herein, the Respondents have violated [T.C.A. § 69-3-114\(a\)](#).

[T.C.A. § 69-3-114\(a\)](#) states:

(a) It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in [§ 69-3-103\(22\)](#), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

[T.C.A. § 69-3-103\(22\)](#) provides:

(22) "Pollution" means such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state including but not limited to changes in temperature, taste, color, turbidity, or odor of the waters:

*7 (A) As will result or will likely result in harm, potential harm or detriment of the public health, safety, or welfare;

(B) As will result or will likely result in harm, potential harm or detriment of the health of animals, birds, fish or aquatic life;

(C) As will render or will likely render the waters substantially less useful for domestic, municipal, industrial, recreational, or other reasonable uses; or

(D) As will leave or will likely leave the waters in such condition as to violate any standards of water quality established by the board.

ORDER AND ASSESSMENT

XXXIX.

WHEREFORE, pursuant to the authority vested by [T.C.A. §§ 69-3-109](#), [69-3-115](#) and [69-3-116](#), [I](#), James H. Fyke, hereby issue the following ORDER and ASSESSMENT to the Respondents:

1. The Respondents shall, within 7 days of receipt of this Order, seed and straw the disturbed areas of the site currently without vegetative cover until implementation of appropriate erosion prevention and sediment control measures designed by a professional engineer or other qualified professional to assure that no additional material leaves the site and enters waters of the state, including, but not limited to, utilization of polyacrylamide products upstream of sediment retention structures. Check dams and basins should be reconfigured so that they will hold water, such as by utilizing geotextile as an interior lining on the stone

surfaces and bottoms of the basis or channels to prevent seepage and leaks. Silt fence is not appropriate for use below outfalls where concentrated flow is leaving the site. Outfalls should be discharging clean water into armored/protected channels; if the discharge contains sediment, it should enter a treatment device such as a sediment trap or basin

2. Documentation by photographs of the properly installed EPSC's shall be sent within 45 days of receipt of the Order, to the Division of Water Pollution Control manager located at the Knoxville Environmental Field Office, 3711 Middlebrook Pike, Knoxville, Tennessee 37921.

3. The Respondents shall maintain appropriate erosion prevention and sediment control measures to assure that no additional material leaves the site and enters waters of the state. These professionally designed controls shall be maintained until final grade and permanent erosion preventive cover is established, including but not limited to, healthy grass and vegetation, pavement, buildings, hardened paths, and heavily mulched areas.

4. The Respondents shall, within 14 days of receipt of this Order, submit an updated SWPPP and applications for any TVA and USACOE permits required for removal of sediment from Tellico Lake along Taffrail Drive and any other location where major sediment deposition has taken place, such as below the pump house (removal vs. restoration in place to be at the discretion of TVA and USACOE).

5. The Respondents shall, within 30 days of receipt of this Order, submit for review and approval a restoration plan and map showing all the locations at which sediment has encroached on neighboring property, including TVA land. The Respondents have stated that discussions with TVA have taken place regarding leaving some of these areas alone to be overtaken by native growth. This submittal is to be formal documentation of the proposed course of action for each location at which damage has taken place to waters of the state and/or non-Rarity Pointe properties.

***8** The restoration plan shall include a time schedule to identify proposed activity dates required to complete the work. This plan shall be submitted to the Division of Water Pollution Control manager located at the Knoxville Environmental Field Office, at the address above, and a copy of each shall also be mailed to the manager of the Enforcement & Compliance Section, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 401 Church Street, L&C Annex 6th Floor, Nashville, TN 37243.

6. The Respondents shall, within ninety (90) days of written approval from the Division, implement the restoration plan. This shall be confirmed in writing and by photographs submitted to the Division at the Knoxville Environmental Field Office and copied to the Division of Water Pollution Control, Enforcement and Compliance Section, at the addresses above.

7. Each Respondent shall, within 1 year of receipt of this Order, provide documentation of attendance and successful completion of the Department's Erosion Prevention and Sediment Control Workshop for all employees who manage or oversee construction projects, to the Division at the Knoxville Environmental Field Office and copied to the manager of the Enforcement & Compliance Section, Division of Water Pollution Control in Nashville at the address previously provided.

8. The Respondents shall pay a CIVIL PENALTY of THREE HUNDRED AND FORTY THOUSAND

SIX HUNDRED DOLLARS (\$340,600.00) to the Department, hereby ASSESSED to be paid as follows:

(a) The Respondents shall, within 30 days of receipt of this ORDER AND ASSESSMENT, pay a CIVIL PENALTY in the amount of ONE HUNDRED TWENTY SEVEN THOUSAND NINE HUNDRED DOLLARS (\$127,900.00).

(b) In the event the Respondents fail to comply with item one above in a timely manner, the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTY NINE THOUSAND DOLLARS (\$39,000.00), payable within 30 days of such default.

(c) In the event the Respondents fail to comply with item two above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of FIFTEEN THOUSAND SIX HUNDRED DOLLARS (\$15,600.00), payable within 30 days of such default.

(d) In the event the Respondents fail to comply with item three above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTY NINE THOUSAND DOLLARS (\$39,000.00), payable within 30 days of such default.

(e) In the event the Respondents fail to comply with item four above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTEEN THOUSAND DOLLARS (\$13,000.00), payable within 30 days of such default.

(f) In the event the Respondents fail to comply with item five above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTY NINE THOUSAND DOLLARS (\$39,000.00), payable within 30 days of such default.

(g) In the event the Respondents fail to comply with item six above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of FIFTY TWO THOUSAND DOLLARS (\$52,000.00), payable within 30 days of such default.

***9** (h) In the event the Respondents fail to comply with item seven above in a timely manner, then the Respondents shall submit a CIVIL PENALTY payment in the amount of THIRTEEN THOUSAND DOLLARS (\$13,000.00), payable within 30 days of such default.

(i) The Respondents shall pay DAMAGES of TWO THOUSAND TWENTY THREE DOLLARS AND FIFTEEN CENTS (\$2,023.15) to the Department, hereby assessed, to be paid within thirty (30) days of receipt of this Order.

The Director of the Division of Water Pollution Control may, for good cause shown, extend once, for a fixed time period, the compliance dates contained within this Order. In order to be eligible for this time extension, the Respondents shall submit a written request to be received a minimum of 30 days in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

The Respondents shall otherwise conduct their business in accordance with the Act and rules promulgated pursuant to the Act. On all land disturbance activities in the state of Tennessee during the next 24 months after the effective date of this Order, including new phases within any current development, the Respondents shall submit EPA Application Form I General Information and Application Form 2F (enclosed) for coverage under an individual NPDES permit for discharge of stormwater to the Division of Water Pollution Control manager located at the Knoxville Environmental Field Office, 3711 Middlebrook Pike, Knoxville, Tennessee 37921 and a copy shall also be mailed to the manager of the Permit Section, Division of Water Pollution Control, Tennessee Department of Environment and

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Conservation, 401 Church Street, L&C Annex 6th Floor, Nashville, TN 37243.

Further, the Respondents are advised that the foregoing ASSESSMENT and ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondents in the future. Failure to comply with this order will result in additional penalties.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 13th day of April, 2007.

James H. Fyke

Commissioner

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END OF DOCUMENT